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The Plurality Paradox: Rapanos v. U.S. and the Uncertain Future of Federal Wetlands Protection

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I. INTRODUCTION

For more than 30 years, the Clean Water Act (CWA) has served as the cornerstone in the federal government's effort to limit the flow of pollution into America's waterways.[1] This landmark piece of legislation enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," [2] has been a point of contention between industry and developers who seek to narrow the Act's reach and environmentalists and health experts who seek to maintain broad regulatory authority for the CWA administrators, the Environmental Protection Agency (EPA) and the

1a. University of Montana School of Law, Class of 2008. I would like to thank my husband, Shawn Johnson, for his guidance and support throughout law school.

1. *See* 33 U.S.C. § 1362(6) (2000) (defining pollutants as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."). The Clean Water Act (CWA) stems from a variety of federal laws dating back to 1899 with the enactment of the Rivers and Harbors Act. Notably, Congress's focus on "clean water" has shifted over time from concerns about navigability to health and environmental concerns. To reflect this transformation, Congress adopted the Federal Water Pollution Control Act (FWPCA) of 1948. Substantial amendments to the FWPCA occurred in 1961, 1972 and 1977. The 1972 amendments set out Congress's broad policy goals and adopted its current name, the Clean Water Act. *See* Pub. L. No. 92-217, § 518, 91 Stat. 1566 (1972) & Pub. L. No. 95-217, § 91 Stat. 1566 (1977).

2. 33 U.S.C. § 1251(a) (2007).

Army Corps of Engineers (Corps). The central issue is whether Congress, in defining waters protected under the CWA as "navigable waters," which the Act defines further as "waters of the United States," authorized federal regulation of wetlands that are not immediately connected to traditional navigable waters. *Rapanos v. U.S.* set the stage for the United States Supreme Court to clarify Congressional intent over the reach of the CWA and thereby set the parameters of federal CWA jurisdiction over wetlands.[3]

Although garnering significant attention from the legal community, environmentalists, property owners, federal regulators and the media, the Court's complicated 4–1–4 split decision in *Rapanos* did not, by any measure, end the debate over the scope of the CWA. Because the Court failed to render a majority opinion, the significance of *Rapanos* on wetland protection is uncertain and will ultimately be determined by the courts charged with deciphering whether to apply the reasoning set forth by the plurality or that presented in Justice Kennedy's concurrence.

This note examines the key issues of the *Rapanos* case, revisits the history of relevant case law, reviews the opinions set forth in *Rapanos*, and offers a critique of the plurality's decision and Justice Kennedy's concurrence. The note argues that the plurality failed to adequately ground their decision in a workable framework for state and federal regulators, favoring instead arguments rooted in policy and ideological preferences, such as a strict constructionist interpretation of the CWA. Further, the note examines the plurality's decision in *Rapanos* and its potential ramifications on the protection of wetlands and water quality in the United States.

Lastly, this note focuses on Justice Kennedy's concurrence, recognizing his important place on the Supreme Court as a moderate in the wake of Justice O'Connor's retirement. Specifically, *Rapanos* suggests that Kennedy may hold significant influence in shaping outcomes of cases that pit the Justices into dueling ideological camps. For example, to the extent that future environmental cases before the court result in a caucusing of the four "liberal" Justices and the four "conservative" Justices, Kennedy's opinion will be central to establishing the ultimate legal framework in which decisions will be made – either as a swing vote or, as in the case at issue, by perhaps single-handedly charting the course of the legal matter at hand.[4]

3. 126 S. Ct. 2208 (2006).

4. For an example of another landmark environmental case in which Justice Kennedy single-handedly swung the Court's decision by siding with Justices Breyer, Ginsburg, Souter and Stevens, *See Mass. v. E.P.A.*, 2007 U.S. LEXIS 3785 (U.S., Apr. 2, 2007), holding that the Environmental Protection Agency may regulate auto emissions to combat global warming under the Clean Air Act and that any refusal to do so must be based on scientific authority. *Id.* at 64–65.

II. BACKGROUND

In *Rapanos*, the Court sought to resolve two consolidated cases from the Sixth Circuit, *Carabell v. U.S. Army Corps of Engineers*[5] and *U.S. v. Rapanos*,[6] that stem from the CWA's prohibition of the discharge of dredged and fill material into the "navigable waters" of the United States without a permit.[7] Both *Carabell* and *Rapanos* addressed the statutory construction of the phrase "navigable waters" and questioned the reach of federal jurisdiction over wetlands that have attenuated connections to traditional navigable waterways.

As previously noted, the CWA's broad purpose is to preserve the integrity of our nation's waters.[8] To meet that end, the CWA provides that "the discharge of any pollutant by any person shall be unlawful."[9] Under the CWA, "discharge of a pollutant" is defined as "any addition of any pollutant to *navigable waters* from any point source,"[10] and "a pollutant" is defined to include "dredged spoil, ... rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[11] Of particular importance to the broad issue of CWA jurisdiction is that "navigable waters" are further defined as "the waters of the United States."[12]

While the CWA generally prohibits the discharge of any pollutant into the nation's "navigable waters," it also establishes a pair of permitting programs under Section 404 to allow the introduction of certain materials into such waters upon authorization by the appropriate authorities. Section

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5. 391 F.3d 704 (6th Cir. 2004), *vacated and remanded, Rapanos v. U.S.*, 126 S. Ct. 2208 (2006).

6. 339 F.3d 447 (6th Cir. 2003), *vacated and remanded, Rapanos v. U.S.*, 126 S. Ct. 2208 (2006).

7. *Rapanos*, 126 S. Ct. at 2219-2220 (consolidation of the cases to review this issue). *See* 33 U.S.C.A. § 1342(a)(1) (West 2000) (authorizing the Administrator of the EPA to "issue a permit for the discharge of any pollutant, notwithstanding 33 U.S.C.S. § 1311(a) (LEXIS 2007)"); *See also* 33 U.S.C.A. 1344(a) (West 2000) (allowing the Secretary of the Army through the U.S. Army Corps of Engineers to issue permits for the discharge of "dredge or fill material into the navigable waters at specified disposal sites.").

8. 33 U.S.C. § 1251(a) (2007).

9. *Id.* at § 1311(a).

10. *Id.* at § 1362(12)(A) (emphasis added); *See also Id.* at § 1362(14) (defining "point source" pollutant as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

11. *Id.* at § 1362(6).

12. *Id.* at § 1362(7); In the context of federal jurisdiction under the CWA, the terms "navigable waters" and "waters of the United States" are often used interchangeably. This is because the Act defines "navigable waters" as the "waters of the United States." In turn, the Army Corps of Engineers has broadly interpreted the phrase "waters of the United States" to include waters beyond those traditionally understood as navigable in fact. In *Rapanos v. U.S.*, Justice Scalia cited the Court's earlier decision in *The Daniel Ball* (1891) and noted that "For a century prior to the CWA, we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 126 S. Ct. at 2216. In *The Daniel Ball*, the Supreme Court held that the test to determine navigability is whether the rivers are "... are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. 77 U.S. 557, 563 (1871).

404(a) of the CWA provides that the Secretary of the Army, through the Corps, may issue a permit for "the discharge of dredged or fill material into the navigable waters at specified disposal sites."[13] The EPA, on the other hand, may issue permits for the discharge of pollutants other than dredged or fill material under Section 402 of the CWA.[14] Although the Corps technically administers the Section 404 permitting program, the EPA has the authority to overrule any permit issued by the Corps.[15]

With this regulatory authority in mind, the Corps, in interpreting "waters of the United States," includes the following:[16]

> (1) All waters which are currently used or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) ...; (5) Tributaries of waters ...; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) ....[17]

"Adjacency" is defined by the Corps as "bordering, contiguous, or neighboring" and includes "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like...."[18] According to the Corps, "[w]etlands" are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[19]

Over the years, judicial review of the CWA has focused on whether the Corps has reasonably interpreted the phrase "navigable waters." Recently, most of the attention has focused on which wetlands fall within the purview of CWA protection. The Supreme Court's landmark decisions, *U.S. v. Riverside Bayview Homes, Inc. (Riverside Bayview)*[20] in 1985, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*[21] in 2001, set the outer limits for interpreting the scope of federal protection of wetlands under the CWA. The Court in *Riverside Bay-*

13. *Id.* at § 1344(a). *Id.* at § 1344(d) (defining Secretary as the Army Corps of Engineers).
14. *Id.* at § 1342(a)(1).
15. *Id.* at § 1344(c).
16. Although the EPA has also defined "waters of the United States," this note focuses on the definitions set forth by the Corps, since the Corps has primary authority over the issuance of permits for dredged and fill material – materials generally used to fill wetlands.
17. 33 C.F.R. § 328.3(a)(1)–(3), (5)–(7) (2007).
18. *Id.* at § 328.3(c).
19. *Id.* at § 328.3(b).
20. 474 U.S. 121 (1985).
21. 531 U.S. 159 (2001).

view accepted the Corps' definition and interpretation of "navigable waters" and "waters of the United States" to include wetlands adjacent to traditional navigable waters,[22] while *SWANCC* narrowly defined the Act's reach by excluding non-navigable, isolated, intrastate waters from federal protection.[23] *Riverside Bayview* was unanimously decided, whereas *SWANCC* was narrowly determined by a slim 5–4 split. *Rapanos*, yet again, squarely raised this murky issue before the Supreme Court.

In *Rapanos*, the plurality, delivered by Justice Scalia (joined by Chief Justice Roberts, and Justices Thomas and Alito), concluded that "waters of the United States" "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]... oceans, rivers, [and] lakes,'" and that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[24] The dissent, delivered by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer), found that wetlands fall under CWA jurisdiction if they are broadly connected to navigable waterways, an approach similar to that taken in *Riverside Bayview*.[25] Justice Breyer, while joining with the dissent, filed a separate dissenting opinion emphasizing the need for the Corps to "write new regulations, and speedily so."[26]

Although Justice Kennedy concurred with the plurality to remand the cases in light of the decision and for further proceedings, he did not agree with their reasoning. Instead, Kennedy concluded that the "significant nexus test," as set forth in *SWANCC*, is the proper method for determining federal jurisdiction over wetlands, so that those wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" would fall under the purview of the CWA.[27] According to Kennedy, this determination would be made by federal regulators on a case-by-case basis.[28]

III. PRIOR LAW

A. *The Clean Water Act, Nonnavigable Waters, and Wetlands*

With the passage of the CWA in 1972, Congress for the first time asserted broad federal protection over the nation's waters in response to

22. *Riverside Bayview*, 474 U.S. at 139.
23. *SWANCC*, 531 U.S. at 171-174.
24. *Rapanos*, 126 S. Ct. at 2225-2226 (plurality).
25. *Id.* at 2225.
26. *Id.* at 2266.
27. *Id.* at 2236 (Kennedy, J., concurring) (citing *SWANCC*, 531 U.S. at 167, 172 (2001)).
28. *Id.* at 2249.

growing public concern about the health and integrity of those waters.[29] In the CWA, Congress used the term "navigable waters" to describe the waters to be protected both because of the federal government's historical protection of such waters,[30] and to provide a direct tie to Congress's Constitutional authority under the Commerce Clause, which authorizes Congress to "regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes."[31]

There is no debate over whether traditional navigable waters fall under CWA jurisdiction. The problem arises when federal authority under the CWA moves beyond traditional navigable waters to nonnavigable tributaries that feed into navigable waters or to ditches and wetlands that have attenuated hydrological connections or ecological relationships to nonnavigable tributaries. The foundational question here is whether or not Congress's regulation of such waters is Constitutional under the Commerce Clause. The Supreme Court's decision in *U.S. v. Lopez*, a 1995 decision in which the Court outlined the modern scope of Congressional regulatory authority under the Commerce Clause, provides guidance on the foregoing issue.[32] In *Lopez*, the Court outlined three areas in which Congress has authority to regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce ... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce...even though the threat may come only from intrastate activities ... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, ... *i.e.*, those activities that *substantially affect interstate commerce* ....[33]

In *U.S. v. Morrison*, the Court determined that, under the third prong, Congress could regulate only economic activities.[34] The question of whether wetlands with attenuated connections to navigable waters meet the foregoing standards is an issue addressed by the Court in *Rapanos*.[35]

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29. *See* 33 U.S.C. § 1251(a); *See also SWANCC*, 531 U.S. at 174.

30. *See* Edward A. Fitzgerald, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 Nat. Res. J. 11, 22-23 (Winter 2003), for a background discussion of the CWA, including its predecessor, the Rivers and Harbors Act of 1899, which emphasized Congress's concern for activities that might hinder the navigability of the nation's waters; *See also* 33 U.S.C. § 401 (1899).

31. U.S. Const. art I, § 8, cl. 3.

32. 514 U.S. 549, 551 (1995) (holding that Congress had exceeded its authority to regulate under the Commerce Clause when it passed the Gun-Free School Zones Act of 1990, which made it a federal crime for an individual to possess a firearm in an area known or reasonably known to be a school zone).

33. *Id.* at 558 (emphasis added).

34. 529 U.S. 598, 613 (2000) (striking down the Violence Against Women Act of 1994 as an impermissible expansion of Congress's authority under the Commerce Clause).

35. 126 S. Ct. at 2246.

In addition to examinations of Congress's authority under the Commerce Clause, much of the history of CWA jurisprudence has focused on whether Congress intended a broad or narrow interpretation of "navigable waters." From the inception of the CWA, there is evidence that Congress intended the former. The House report accompanying the Federal Water Pollution Control Act Amendments of 1972, for example, states that "[the Committee on Public Works] fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[36] As a result, the Corps and EPA implemented regulations under the CWA that have broadly interpreted "navigable waters" to include wetlands adjacent to navigable waters as well as wetlands adjacent to tributaries of navigable waters, "the use...or destruction of which could affect interstate or foreign commerce."[37] Of particular importance is the Corps' inclusion of wetlands that are adjacent to nonnavigable tributaries, and further, wetlands that are separated from nonnavigable tributaries by river berms or other barriers.[38] In issuing these regulations, the Corps recognized that many of the nation's wetlands are not immediately adjacent to traditional navigable waters. In doing so, the federal government has played an important role in preserving and maintaining the nation's remaining wetlands that are essential for overall water quality, floodwater storage, and wildlife and aquatic habitat.

The following discussion addresses the scope of "navigable waters" through a review of landmark cases affecting the protection of wetlands, with specific attention focused on the elements that led courts to apply either a broad or narrow interpretation of CWA jurisdiction over wetlands that are not immediately attached or abutted to traditional navigable waterways and whether such an interpretation is reasonable, according to the Supreme Court.

B. *Broad Federal Protection of Nonnavigable Waters*

The CWA explicitly references the relationship between federal and state involvement in protecting the nation's waters, and expressly recognizes the responsibilities and rights of states with respect to water pollution, including a provision, 404(g) (codified at 33 U.S.C.A. § 1251(b)), that provides for a permitting process designed and implemented by states.[39] Over time,

36. H.R. Rpt. 92–911 at 131(March 11, 1972); *See also* Sen. Conf. Rpt. 92–1236 at 144 (Sept. 28, 1972).

37. 33 C.F.R. § 328.3(a) (2007); *See also* 40 C.F.R. § 122.2 (2007) (EPA definition).

38. 33 C.F.R. § 328.3(a)–(c).

39. 33 U.S.C.A. § 1251(b) (West 2007) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to

broad interpretation of the term "navigable waters," premised on the definitions developed by the Corps and the EPA, served to widen the scope of federal protection. The landmark case *Riverside Bayview* set forth the standard for broad interpretation of "navigable waters" with respect to federal protection of wetlands under the CWA.[40]

In *Riverside Bayview*, respondent – developer began filling 80 acres of low-lying marshy land for the construction of a housing development.[41] Believing the marsh was an "adjacent wetland," the Corps filed suit for an injunction to halt the development in the U.S. District Court for the Eastern District of Michigan.[42] The district court agreed with the Corps's assertion that wetland in question was covered by the CWA and enjoined the respondent from filling the wetland without first obtaining a permit in accordance with Section 404 of the CWA.[43] After two appeals, the Sixth Circuit reversed the district court's decision, holding the wetlands in question were not protected by the CWA because the property was not "subject to flooding by adjacent navigable waters at a frequency sufficient to support growth of aquatic vegetation."[44] According to the court, Congress did not intend to allow the regulation of wetlands that were not created by the flooding of navigable waters.[45]

The Supreme Court granted certiorari to "consider the proper interpretation of the Corps' regulation defining 'waters of the Untied States' and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling."[46] On review, the Court determined the Corps acted reasonably in interpreting the CWA to require a permit to discharge fill or dredge material into wetlands that are adjacent to "waters of the United States" and their tributaries, regardless of whether the wetland resulted from "flooding or permeation by water having its source in adjacent bodies of open water."[47] Although the court did not directly address whether the Corps had regulatory authority over wetlands that were not directly adjacent to open bodies of water, it noted that:

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consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.").

40. 474 U.S. 121.
41. *Id.* at 124.
42. *Id.*
43. *Id.* at 125.
44. *Id.*
45. *Id.*
46. *Id.* at 126.
47. *Id.* at 134.

> Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.[48]

Notably, the decision in *Riverside Bayview* reinforced the Corps' and the EPA's broad authority to regulate waterways and wetlands under the CWA.

C. *A New Era – Limiting the Scope of the Clean Water Act*

The Court's decision in *Riverside Bayview* did little to quell the debate over the expansion of federal regulatory authority over wetlands under the CWA. In 2001, the Supreme Court once again addressed the issue of Section 404 permitting for "navigable waters" under the CWA. The case in question, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, centered on whether isolated ponds at an abandoned gravel pit, which a consortium of municipalities sought to develop as a solid waste disposal site, were subject to protection under the CWA because of their use by migratory birds.[49]

In *SWANCC*, the municipalities applied for the necessary state and federal Section 404 permits, but the Corps determined that the Agency: (1) "had not established that its proposal was 'the least environmentally damaging, most practicable alternative' for disposal of non-hazardous solid waste;" (2) had not provided adequate funding to "remediate leaks" which "posed an unacceptable risk to the public's drinking water supply;" and (3) the project's impact to "area- sensitive species" was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat."[50] The U.S. District Court for the Northern District of Illinois granted summary judgment to the Corps.[51]

On appeal to the Seventh Circuit, the municipalities argued the Corps had exceeded their authority under the CWA, and that nonnavigable, isolated, intrastate waters failed to fall within the Act's jurisdiction when the decision is based solely on the presence of migratory birds.[52] Conversely, the Corps argued that "navigable waters" and "waters of the United States" included waters that were used by migratory birds that crossed state lines.[53] The Seventh Circuit held that Congress had the authority to regulate waters frequented by migratory birds under the Commerce Clause, and that such

48. *Id.* at 133.

49. 531 U.S. 159 (2001). The "Migratory Bird Rule" resulted from an attempt by the Corps to clarify the scope of "navigable waters" to include those waters which were being used or had the potential to be used as habitat for migratory birds that cross state lines – thus falling under the purview of the Commerce Clause.

50. *Id* at 165 (Court quoting Corp's decision document).

51. *Id.* at 165.

52. *Id.* at 164-166.

53. *Id.* at 163-166.

waters fell under the purview of Section 404 of the CWA.[54] The Court's decision was based largely on the question of whether "the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce."[55] The Court stated the following:

> We observed in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir.1993), that "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds." (citation omitted)... [W]e find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.[56]

Despite the Seventh Circuit's findings, the Supreme Court reversed, holding that the "navigable waters" described in the text of CWA did not apply to nonnavigable, intrastate, isolated waters with no hydrological connection to traditional navigable waters, and stated that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the 'waters of the United States.'"[57] Finally and perhaps most importantly, the Court stated that it was the "significant nexus" between the wetlands and "navigable waters" that informed their reading of the CWA in *Riverside Bayview*, indicating support for the "significant nexus" standard as the test for determining whether a body of water falls within CWA protection.[58]

D. *Regulatory Authority after* SWANCC

The Court's decision in *SWANCC* signaled the first substantial win for those seeking to narrow the reach of the CWA. However, the regulatory response by the Corps and the EPA was not exactly what proponents of limited CWA jurisdiction had in mind. In a joint memorandum, the Corps and the EPA made it clear that "field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the

54. *Id* at 166.
55. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999), *rev'd*, 121 S. Ct. 675 (2001).
56. *Id.*
57. *SWANCC*, 531 U.S. at 167-168.
58. *Id.* at 167.

assertion of regulatory jurisdiction under the CWA."[59] However, the memorandum also established that both agencies would continue to assert broad authority of the nation's waters, stating that the Court's holding in *SWANCC* "was strictly limited to waters that are 'nonnavigable, isolated, [and] intrastate.' With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions."[60] In other words, the Corps continued to assert broad regulatory authority over waters with attenuated hydrological connections to navigable waters.

According to the memorandum, the Corps and the EPA considered most regulatory definitions of "waters of the United States" intact, including "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," "[a]ll interstate waters including interstate wetlands," "[t]ributaries to waters ...," and "[w]etlands adjacent to waters (other than waters that are themselves wetlands)...."[61] Additionally, the memorandum questioned whether "other waters," as used by the Corps and the EPA in their definition of "waters of the United States," would sustain future challenges, since the majority in *SWANCC* "reserved the question of what 'other waters' were intended to be addressed by CWA § 404(g)(1) (regarding state 404 programs)."[62] Finally, and most significantly, the memorandum stated that:

> The Supreme Court's decision in *SWANCC* does provide an important new limitation on how and in what circumstances the EPA and the Corps can assert regulatory authority under the CWA. However, this decision's limited holding must be interpreted in light of other Supreme Court and lower court precedents, unaffected by the *SWANCC* decision, which precedents broadly uphold CWA jurisdictional authority.[63]

Following *SWANCC*, lower courts split over how to interpret the Supreme Court's conclusions. Some courts applied *SWANCC* in a manner that limited jurisdiction over isolated waters and wetlands that were not immediately attached to traditional navigable waters, whereas other courts followed the Corps' and the EPA's interpretation of *SWANCC* to support continued federal regulation of some isolated waters that have been protected traditionally under the Corps' definition of "navigable waters." For

59. Gary S. Guzy & Robert M. Andersen, *Memorandum from the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Regarding the Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, www.wetlands.com/fed/swanccguide.htm (Jan. 19, 2001).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

example, the Fifth Circuit's decision *In re Needham* held that "in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation ... if the body of water is actually navigable or adjacent to an open body of navigable water.'"[64] In an opposite application of *SWANCC*, the Fourth Circuit in *U.S. v. Deaton* concluded that "[t]he agency's interpretation of the statute [defining "waters of the United States"] therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional."[65]

The Corps' and the EPA's broad reading of *SWANCC* would inevitably be tested in various courts around the country. Although *SWANCC* resolved the issue of whether the CWA applied to nonnavigable, isolated, intrastate ponds, the Court's holding created more questions than answers for regulatory agencies charged with administering the Act's provisions. In particular, since the opinion did not specifically identify a methodology for determining how one judges the connection between wetlands and traditional "navigable waters" for purposes of CWA jurisdiction, questions remained over how far wetlands could be removed from traditional "navigable waters" while maintaining CWA protection. For example, the Court failed to clarify the necessary test for determining a "significant nexus," leaving it to the Corps and the EPA to revise their regulatory guidance with only nebulous instruction from the Court. Additionally, failing this clarity, the network of regulatory agencies at the federal, state and local level could not fully adapt their rules in light of Court's decision. Finally, *SWANCC's* narrow holding that the CWA did not extend to nonnavigable, isolated, intrastate ponds is juxtaposed against the Court's larger concern that federal protection of such waters exceeded the outer limits of the Commerce Clause.[66]

III. THE DECISION

Rapanos v. U.S., decided by the Court on June 19, 2006, originated over 17 years ago when John Rapanos decided to develop portions of his 175 acre piece of property in Williams Township, Bay County, Michigan.[67] Despite warnings from the EPA, the Michigan Department of Natural Resources (MDNR), and his own hired consultant that the site contained wet-

64. *In re Needham*, 354 F.3d 340, 345–346 (5th Cir. 2003) (citing *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)).

65. 332 F.3d 698, 708 (4th Cir. 2003).

66. *SWANCC*, 531 U.S. at 172-174.

67. *Rapanos*, 339 F.3d at 448-449, *vacated and remanded*, *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006).

lands subject to the Corps' permitting authority, Rapanos defiantly filled the wetlands with earth and sand without proceeding through the correct regulatory channels.[68] Specifically, Rapanos's wetlands were "connected to the Labozinski Drain (a one-hundred-year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable."[69] Rapanos was subsequently charged "with knowingly discharging pollutants into the waters of the United States without a permit, a violation of the Clean Water Act."[70] At trial, Rapanos argued that his property did not fall within the purview of the Corps and the EPA because the wetlands in question were not "navigable waters" within the meaning of the CWA.[71] At the conclusion of the second trial (the first resulted in a mistrial), the district court found Rapanos guilty and sentenced him to three years probation and $185,000 in fines.[72] Following various procedural maneuvers and appeals, the Supreme Court granted certiorari (after the first was denied) and ordered the district court to consider the case in light of their decision handed down in *SWANCC*.[73]

The district court, in finding that *SWANCC* "had changed the scope of federal jurisdiction under the Clean Water Act," dismissed the convictions rendered against Rapanos, and found that the filled wetlands were not "directly adjacent to navigable waters" and, therefore, not within the scope of federal jurisdiction.[74] On appeal, the Sixth Circuit addressed whether the decision set forth in *SWANCC* not only removed isolated, intrastate waters used solely by migratory birds, but also removed some wetlands that are not immediately adjacent to traditional navigable waters. Ultimately, the Sixth Circuit concluded that wetlands need not directly abut "navigable waters" to be protected under the CWA.[75] Rather, the court stated that only a hydrological connection between the wetland and traditional "navigable waters" is required.[76] As in *SWANCC*, however, the Sixth Circuit did not prescribe a methodology for determining the existence of a hydrological connection, nor did they set a standard for determining a level of connection that would guarantee protection under the CWA. Rapanos appealed and was granted certiorari by the Supreme Court.[77]

In *Carabell*, the wetlands in question consist of 15.9 acres of forested wetlands that, like the wetlands in *Rapanos*, are not immediately connected

68. *Id.* at 449.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 450.
74. *Id.*
75. *Id.* at 453.
76. *Id.*
77. *Rapanos*, 126 S. Ct. 2208.

to a traditional navigable waterway.[78] The wetland is separated from an unnamed ditch by berms approximately four feet wide that were created when the ditch was excavated.[79] Although the record does not establish the direction of water flow, the ditch drains from the northeastern corner of the property into the Southerland-Oemig Drain, which flows into Auvase Creek.[80] Auvase Creek flows directly into Lake Saint Clair, a traditional navigable waterway, which provides the link between Lake Huron and Lake Erie.[81] Unlike Rapanos, the Carabells applied for a permit to fill the wetlands for a 130-unit condominium complex, but the EPA and the U.S. Fish and Wildlife Service (FWS) claimed "the proposed activity would have a significant adverse impact on the natural resources, public interest and public trust held in the subject wetlands" and denied the permit.[82] A Michigan administrative law judge overturned the ruling and ordered the Michigan Department of Environmental Quality (MDEQ) to grant the permit in compliance with the CWA's Section 404(g) permitting program.[83] The ruling also reduced the size of the condominium development to 112 units and required the Carabells to participate in on-site wetland enhancement.[84] The EPA, through its continued objections to the issuance of the permit, asserted jurisdiction under the CWA and granted the Corps authority to process the application.[85] The Corps then issued an evaluation denying the permit on the grounds that the development "would have major long term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area."[86]

Following the denial of their final administrative appeal, the Carabells filed suit in the U.S. District Court for the Eastern District of Michigan, arguing that the wetlands were not a "water of the Untied States" within the meaning of the CWA.[87] The magistrate judge denied the claim by concluding that "because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA."[88] On appeal, the Sixth Circuit affirmed the district court's ruling that "there is a 'significant nexus' between the wetlands on the Carabells' property, a ditch that flows one way or another into other tributaries of

78. *Carabell*, 391 F.3d at 705-706, *vacated and remanded, Rapanos v. U.S.*, 126 S. Ct. 2208 (2006).
79. *Id.* at 705.
80. *Id.*
81. *Id. at 708*
82. *Id.* at 706. (Court quoting the USFWS/EPA comments filed opposing the application).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id* at 707.
88. *Id.* at 707. (6th Circuit Court of Appeals quoting federal district court magistrate judge).

navigable waters of the United States."[89] The Carabells were also granted certiorari by the Supreme Court, and the case was consolidated with *Rapanos v. United States* for review.[90]

A. *The Plurality*

On review, the plurality opinion, authored by Justice Scalia, vacated the Sixth Circuit's decisions in both *Carabell* and *Rapanos* and remanded the consolidated cases for further proceedings to determine:

> ...in the first instance, whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.[91]

The plurality concluded that "the phrase 'waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] oceans, rivers, [and] lakes,'" and does not "include channels through which waters flow intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[92]

The plurality reasoned that the Corps' interpretation of the scope of the CWA had expanded beyond any permissible understanding of the Commerce Clause as well as the Court's previous jurisprudence on CWA jurisdiction. In support of this proposition, the plurality outlined the history of the phrase "navigable waters" of the United States, determining that it was originally understood to include waters that are "navigable in fact" or "readily susceptible of being rendered so."[93] The opinion compared this construction with the Corps' historically broad interpretation of "navigable waters," which, following the Court's decision in *Riverside Bayview*, included wetlands that are "adjacent" or that abut traditional navigable waterways. The plurality focused heavily on the fact that the Corps' expansive definition of "navigable waters" continued despite the Court's more limited holding in *SWANCC*, which precluded jurisdiction over "nonnavigable, isolated, intrastate waters."[94] In *Rapanos*, the plurality took significant issue with the Corps' assertion of jurisdiction over "'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of the 'waters of

89. *Id.* at 710.
90. *Rapanos*, 126 S. Ct. 2208.
91. *Id.* at 2235 (plurality).
92. *Id.* at 2225.
93. *Id.* at 2216 (plurality) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1871)).
94. *Id.* at 2216-2217.

the United States'" if such waters had a discernable "ordinary high water mark."[95] These definitions of "navigable waters," according to the plurality, give the Corps jurisdiction over "virtually any parcel of land containing a channel or conduit ... through which rain water or drainage may occasionally or intermittently flow."[96] The plurality argued that such an intrusion distorts the limits of federal power under the CWA.[97]

The opinion then turned to an examination of the Corps' definition of "adjacency" and posited that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[98] Having previously set forth a preferred definition of "navigable waters," the plurality established a *de facto* two-part test for determining federal jurisdiction over wetlands under the CWA with their definition of "adjacency." First, any adjacent channel must contain a "water of the United States," and second, the wetland must have a continuous surface connection with that water, "making it difficult to determine where the 'water' ends and the 'wetland' begins." [99] In referring to the situation, Justice Scalia noted that such wetlands do not implicate "the boundary drawing problem" presented in *Riverside Bayview* because isolated, intermittent waters are clearly not "waters of the United States" within the meaning of the CWA.[100] Ultimately, the plurality determined that the Sixth Circuit, in deciding *Rapanos* and *Carabell*, applied "the wrong standard" by following the Corps' definition of "adjacency" and "waters."[101] Noting this misstep and the "paucity of the record in both of these cases," the plurality remanded the case for further proceedings.[102]

B. *Justice Kennedy's Concurrence*

Justice Kennedy concurred in the plurality's judgment but on different grounds. The central issue identified by Kennedy is whether "the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact."[103] Kennedy concluded that the facts of the consolidated cases, when illuminated by the Court's decisions in *SWANCC* and *Riverside Bayview*, left one fundamental issue unaddressed by the lower courts – the question of whether

95. *Id.* (*See also* 33 C.F.R. § 328.3(e) (2000)).
96. *Id.* at 2215.
97. *Id.*
98. *Id.* at 2226.
99. *Id.* at 2227.
100. *Id.* at 2226.
101. *Id.* at 2235.
102. *Id.*
103. *Id.* at 2236 (Kennedy, J., concurring).

the wetlands at issue "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[104]

Kennedy reached the foregoing conclusion after examining the statutory language of the CWA, the facts of the *Rapanos* and *Carabell* cases, and the Court's decisions in *Riverside Bayview* and *SWANCC*.[105] His analysis of the CWA focused on the importance of the phrase "navigable waters" in determining the intended scope of the legislation, noting that both the CWA's purpose and its regulatory components hinge on that language.[106] Kennedy reviewed the interpretation of "navigable waters" by the plurality and contrasts the definition with that provided by the Corps and supported by the dissent (joined by Justices Souter, Stevens, Breyer and Ginsburg).[107] On this note, he concluded that the plurality "reads nonexistent requirements into the Act," while the dissent "reads a central requirement out – namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[108] Kennedy's analysis of the CWA also focused on the definition of the specific waters at issue in the case – wetlands. He reviewed several scientifically-based definitions of what constitutes a wetland and took pains to distinguish those definitions from the simple descriptive definition of "moist patches of earth" put forth by the plurality.[109]

Following this statutory and scientific analysis, Kennedy reviewed the facts of the *Rapanos* and *Carabell* cases and applied them to the reasoning set forth in *SWANCC* and *Riverside Bayview*. It is here that Kennedy reaffirmed the "significant nexus" standard (originally set forth in *Riverside Bayview*) as the applicable point of review:

> Taken together, these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that they Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. *Absent a significant nexus, jurisdiction under the Act is lacking.*[110]

Kennedy's opinion then provided some, albeit limited, guidance for determining the existence of a "significant nexus" as outlined above. Most significantly, Kennedy concluded that an established hydrological connection is not alone sufficient to meet the significant nexus standard.[111] More-

104. *Id.* (citing *SWANNC*).
105. *Id.* at 2237 – 2250.
106. *Id.* at 2241.
107. *Id.* at 2247.
108. *Id.*
109. *Id.* at 2237–2238.
110. *Id.* at 2241 (emphasis added).
111. *Id.* at 2251.

over, he contends that a hydrological connection -- the basis used to establish the government's argument that it had met the "significant nexus" standard -- "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[112] In addition to highlighting this distinction between "significant nexus" and "hydrological connection," Kennedy also noted the inappropriateness of the Corps' method of using the existence of an "ordinary high water mark" to identify tributaries.[113] In this instance, he argued that the "breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it – precludes its adoption as the determinative measure...."[114]

Finally, Kennedy offered that until and unless further regulatory provisions clarify the treatment of wetlands that are not themselves, nor adjacent to, traditional navigable waters under the CWA, "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[115] Except for the guidance mentioned above, Kennedy leaves it to the lower courts and the regulatory agencies to determine the method of establishing the significant nexus standard as described in his opinion.

C. *The Dissent*

According to the dissent, authored by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, the larger issue presented by *Carabell* and *Rapanos* is "whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice Kennedy...."[116] The dissent reasoned that the appropriate standard for determining whether wetlands constitute "waters of the United States" for purposes of the CWA was set forth in *Riverside Bayview*.[117] Here, the dissent argued that the particular wetland at issue in *Riverside Bayview* "abutted a navigable creek," where the Court framed the issue more generally as whether the CWA extended to "wetlands adjacent to navigable bodies of water *and their tributaries*."[118]

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112. *Id.*
113. *Id.* at 2249.
114. *Id.*
115. *Id.*
116. *Id.* at 2252 (Breyer, Ginsburg, Souter & Stevens, JJ., dissenting).
117. *Id.* at 2255.
118. *Id.*

Unlike the plurality or Justice Kennedy, the dissent would have upheld the Sixth Circuit's decisions in both *Rapanos* and *Carabell*.[119] The dissent wholly supported the conclusions reached by the Corps as a "reasonable interpretation of a statutory provision."[120] In this respect, the dissent questioned the plurality's challenge to the Corps' central role in answering the "technical and complex character" of jurisdictional questions relating to wetlands and tributaries of those wetlands over the past 30 years.[121] Furthermore, the dissent clarified that such deference to the Corps did not correlate to unbridled federal oversight, noting that in instances where wetlands are "not significantly intertwined with the ecosystem of adjacent waterways," the Corps may issue a permit for development.[122]

The dissent also objected to any new or proposed constraints on the Corps' determination of jurisdiction.[123] Most notably, the dissent took issue with the plurality's construction of a two-part test (adjacency determined by whether abutting water is a "water of the United States" and whether the wetland has a continuous surface connection with that water), saying that it "can only muddy the jurisdictional waters."[124] Additionally, the dissent reasoned that the Court's decision in *SWANCC* had "nothing to say about wetlands...adjacent to traditionally navigable waters or their tributaries," and should therefore not be used as the basis for limiting federal jurisdiction over wetlands similar to those in the *Rapanos* and *Carabell* cases.[125] Lastly, the dissent also realized that the plurality and concurring opinion defined "different tests to be applied on remand" and instructed that "each of the judgments should be reinstated if either of those tests is met."[126]

IV. ANALYSIS

The plurality decision handed down in *Rapanos v. U.S.* was decided incorrectly, and provides little, if any, guidance for federal regulators charged with protecting the nation's waters under the CWA. In large measure, this resulted from the plurality's near total dismissal of the Corps' and the EPA's expertise in environmental protection and hydrology, and their strategic use of excerpts from *Riverside Bayview* and *SWANCC* to support their two-part test for determining the waters covered under CWA. These actions did little but expose the plurality's ideological persuasions and policy preferences. As such, the Court's fractured decision reflects a spectrum of

119. *Id.* at 2265.
120. *Id.* at 2252. *See also Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984) (discussing a standard by which regulatory definitions are deemed reasonable).
121. *Rapanos*, 126 S. Ct. at 2252 (Breyer, Ginsburg, Souter & Stevens, JJ., dissenting).
122. *Id.* at 2258.
123. *Id.* at 2259.
124. *Id.* at 2259.
125. *Id.* at 2256-2257.
126. *Id.* at 2265.

opinions that resulted in an unnecessarily complex outcome that may significantly affect enforcement of the CWA, with likely adverse consequences to water quality and environmental health.

While the *Rapanos* decision muddies the regulatory waters, it provides a surprising level of clarity on another matter – the level to which the Justices in the newly established Roberts Court are willing to shape their arguments with ideology. If this style and approach represents the hallmark of the decision, then *Rapanos* may be but a preview of how the Court will address future contentious environmental decisions. Moreover, the decision may signal a call to gain a better understanding of Justice Kennedy's approach to deciding environmental disputes, due to his position at the ideological center of the Court and his ability to personally swing the outcome of split decisions.

This section will first investigate the opinions set forth by the plurality and Justice Kennedy, and then consider the potential ramifications of the split decision not only on water quality and wetland protection but also on the Roberts Court generally. The role of Justice Kennedy as the Court's swing voter will also be highlighted.

A. *Review of the Court's Reasoning*

The two legal issues at the center of the *Rapanos* case are: (1) Congress's authority to regulate the wetlands in question under their Commerce Clause authority, and (2) the reasonableness of the Corps' interpretation of "the waters of the United States" as put forth in the CWA.

The plurality's review of the question of constitutionality under the Commerce Clause is diffuse and vague. In fact, the plurality stopped short of providing formal analysis or a definitive statement on the issue, issuing instead a tersely worded statement that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."[127]

Interestingly, the Commerce Clause question is most thoroughly investigated and addressed in the respondent's brief. [128] Grounding their argument in the decisions reached in legal precedent, including *Lopez* and *Deaton,* the government demonstrates that "Congress's power to regulate the channels of commerce 'carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.'"[129] The government convincingly argues and logically finds that "[i]n light of the potential for the discharge of pollutants into such wetlands to degrade the quality of the adjacent tribu-

127. *Rapanos*, at 2224 (plurality).

128. United States' Government - Respondents

129. Br. of Respt. at 41, *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (citing *U.S. v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003)).

taries and the traditional navigable waters themselves, Congress could reasonably conclude that the exclusion of such wetlands from the CWA's coverage 'would leave a gaping hole' in the statutory scheme."[130]

Although the Court provides no direct answer to the question of Congress's authority under the Commerce Clause in its *Rapanos* decision, the government appropriately grounds its argument in legal precedent and correctly concludes that there is no substantial challenge to Congress's ability to regulate the wetlands in question under the scope of their commerce authority.

The vaguer, and therefore more legally difficult question hinges on the issue of the "reasonableness" of the Corps' inclusion of the wetlands in *Carabell* and *Rapanos* as "waters of the United States" as defined in the CWA. The standard for reasonableness, as set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, is "whether the agency's [construction of the statute which it administers] is based on a permissible construction of the statute."[131]

The Court's *Riverside Bayview* decision stands out for its deliberate and measured approach to the reasonableness question. In that decision, the Court characterized its task as one of "regulatory and statutory interpretation," stating "we must determine whether respondent's property is an 'adjacent wetland' within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over 'navigable waters' gives it statutory authority to regulate discharges of fill material into such a wetland."[132] In answering this question, the Court looked first to the Corps' definitions of "adjacent wetlands" and determined that the land in question fell within that definition. The Court then reviewed the methodology by which the Corps established its definition. The unanimous decision stated:

> Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of 404(a).[133]

After carefully considering the facts of the case, the Corps' efforts of interpreting and enforcing the CWA, and the purpose of the CWA as passed by Congress, the Court in *Riverside Bayview* concluded, "we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore

130. *Id.* at 46 (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)). (internal citation omitted).
131. 467 U.S. 837, 842 (1984).
132. *Riverside Bayview*, 474 U.S. at 126 (1985).
133. *Id.* at 132.

conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[134]

The *SWANCC* decision signals a significant departure from the approach to the reasonableness question outlined in *Riverside Bayview*. This shift is characterized by the Court's greater emphasis on the text of the CWA than on its intent and purpose.[135] The direct impact of this change in emphasis was the Court's dismissal of the Corps' "Migratory Bird Rule" as unreasonable. The indirect impact of this new approach was a change in the level of judicial activism. As noted by Edward A. Fitzgerald in his analysis of the *SWANCC* decision, "[t]he Court acted as an autonomous interpreter, solving the statutory puzzle through ingenuity, rather than a faithful agent of the legislature or administrative agency, discovering meaning through an archeological search."[136] This approach, notes Fitzgerald, "enabled the Court to establish its own policy preferences."[137] As such, *SWANCC* departed from the approach set forth in *Riverside Bayview* in favor of its own policy prescriptions and ideological preferences.[138] Moreover, the decision represented a figurative "shot across the bow," whereby the Court signaled to the Corps that it was willing to take an active role in shaping the future of wetland protection.

The plurality's decision in *Rapanos* represented a second shot, going so far as to define its own standard for determining whether waters are subject to the permitting regulations outlined in the CWA.[139] This approach not only flies in the face of the *Chevron* decision, which concluded that, in instances where Congress has not specifically addressed the question, the Court cannot "simply impose its own construction on the statute,"[140] but it also stands in sharp contrast to the Sixth Circuit's analysis of *Rapanos*.

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134. *Riverside Bayview*, 474 U.S. at 135. More precise to the issue, the *Riverside Bayview* opinion stated, "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134.

135. For example, note the Court's focus on the term "navigable" as reviewed in *Riverside Bayview* and revisited in *SWANCC*, the Court concluded that the term "'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172.

136. *Supra* n. 30, at 18.

137. *Id.*

138. For an interesting critique of the judicial activism of the Rehnquist Court, including the Court's approach to federalism issues, *see The Rehnquist Court: Judicial Activism on the Right* (Herman Schwartz ed., Hill & Wang 2003).

139. The "shot across the bow" analogy seems particularly apt in light of Chief Justice Roberts' concurring opinion stating, "rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." *Rapanos*, at 2236 (Roberts, C.J. concurring).

140. *Chevron*, 467 U.S. at 843.

Notably, the Sixth Circuit concluded that "there is no 'direct abutment' requirement in order to invoke CWA jurisdiction."[141] Further, the Sixth Circuit, grounding its analysis in the reasoning set forth in *Riverside Bayview* and *SWANCC* rather than inventing its own statutory construction, noted that "non-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke CWA jurisdiction."[142]

Instead of following legal precedent or the Sixth Circuit's approach, the *Rapanos* decision reflects an attempt to frame the decision as a policy-based argument rooted in dictionary definitions of key terms.[143] This framing is troubling because of its activist approach, limited grounding in legal precedent, and potential ramifications for protecting the nation's water quality. Most notably, the plurality's definition of "waters of the United States" would restrict the scope of federal jurisdiction under the CWA even beyond those outlined in *SWANCC*, currently regarded as the Court's most narrow interpretation of the CWA. An even more narrow interpretation of the CWA is problematic not only in terms of judicial and regulatory continuity, but also because the question of federal jurisdiction under the CWA has important policy and environmental health consequences.[144] For example, just prior to the *Rapanos* decision, the EPA estimated that if the CWA statute were narrowed to align with the definition proposed by *Carabell* and *Rapanos*, up to 59% of the total length of streams in the U.S. would be affected.[145] Notably, the EPA found that approximately 110 million people draw their drinking water from these waters.[146]

Importantly, neither the Court's decision in *Chevron*, nor the Court's application of the *Chevron* standard in *Riverside Bayview* and *SWANCC* supports the plurality's conclusions. Moreover, in grounding its decision in its own regulatory construction, the plurality's charge to lower courts mischaracterizes the legal question at hand (that of reasonableness) as an exercise in applying its new regulatory standard.

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141. *U.S. v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004).

142. *Id.*

143. *Rapanos*, 126 S. Ct. at 2220-2221 (plurality) (extrapolating the 1954 edition of the Webster's New International Dictionary's definition of "water" to inform the plurality's understanding of "waters of the United States" within the meaning of the CWA).

144. *See* Br. of Respt. at 22, *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006) (noting that "[a] blanket exclusion of nonnavigable tributaries from the CWA's coverage would be particularly unwarranted because the CWA permitting process affords a flexible, case-specific mechanism for assessing the likely impacts of a particular proposed discharge into such waters. The decision of the Corps and EPA to include tributaries of traditional navigable waters (and their adjacent wetlands) within the regulatory definition of 'waters of the United States' does not mean that pollutant discharges into such tributaries are automatically prohibited. It simply means that the responsible agency will scrutinize and attempt to mitigate the likely impacts of a proposed discharge on the public interest (including the protection of traditional navigable waters) before deciding whether the project may go forward.").

145. Br. of Amici Curiae from the Association of State Wetland Managers, Association of State Floodplain Managers, and New England and Interstate Water Pollution Control Commission in Support of Respondent United States, 2006 WL 139206, appendix.

146. *Id* at 20.

The analysis set forth by the plurality, corrupted by policy preferences and ideological persuasions, failed to attract a majority of justices. As such, Justice Kennedy's concurring opinion also warrants review. In comparison to the plurality's opinion, Justice Kennedy's concurrence is strikingly moderate in its legal approach and nearly void of ideological rhetoric. Kennedy's deliberate review of the language, scope, and purpose of the CWA and its evolution stands apart from the plurality's coarse opinion. His methodical review of the decisions in *SWANCC* and *Riverside Bayview* contribute to the legitimacy and credibility of his opinion. Even so, Kennedy's opinion challenged several of the Corps' key assertions and sets forth its own statutory prescription – a requirement that the Corps establish a "significant nexus" on a case-by-case basis, as informed by the Court's decisions in *Riverside Bayview* and *SWANCC* and clarified in Kennedy's concurrence. Kennedy's statutory construction not only stands to complicate regulation and enforcement of the permitting programs of the CWA, but it also misconstrues the question of reasonableness into defining a new regulatory standard. As a result, Kennedy's concurring opinion also failed to answer the key question facing the court – whether the Corps interpretation was reasonable.

The analysis employed by the plurality and Justice Kennedy resulted in a complicated split decision that relied too heavily on policy preferences and prescriptions in addressing the questions at issue. Of the two approaches, Justice Kennedy's concurrence stands out as the more moderate analysis of the legal questions at hand, and as such, which will likely be the guidepost for future rulemaking and legal review.

Rather than provide two new (sometimes contradictory) statutory standards, the plurality and Justice Kennedy should have restricted their opinions to the sideboards set forth in *SWANCC* and *Riverside Bayview*. As seen in the district court's and the Sixth Circuit's opinions, there was adequate room within those precedents to address the unique geographic nature of the wetlands in *Rapanos* and *Carabell*. Of the opinions of the Court, the dissent's approach – especially with respect to the question of the reasonableness of the Corps' interpretation of "waters of the United States" – is the most correct; it was the most consistent with policy and regulatory history on the topic, fully grounded in the decisions of *SWANCC* and *Riverside Bayview*, and constrained by the *Chevron* holding from introducing an alternative interpretation of the proper regulatory standard for review.

B. *Institutional Dimensions of* Rapanos

While the *Rapanos* decision failed to clarify the scope of federal jurisdiction under the CWA, it provided significant insights into key structural relationships in the new Roberts Court. The most noteworthy revelation is the emergence of Justice Kennedy as a prominent voice in the outcome. The high profile of his opinion as the lone concurring voice contributes to Ken-

nedy's growing importance in controversial Court decisions and solidifies his role as the "swing voter" between the conservative and liberal justices.

Since Justice O'Connor's departure, there has been growing interest in Justice Kennedy, widely seen as the "middle man" both ideologically and with respect to a number of controversial issues before the court – from abortion to free speech to federalism.[147] With his pivotal role in both *Rapanos* and *Kelo*,[148] Kennedy can add environmental issues to the list. Although his role has certainly been highlighted since O'Connor's departure, Kennedy has a long history of being in the majority on cases with an environmental angle. For example, from 1988 to 2000, Justice Kennedy was in the majority in 56 of 57 environmental cases before the Court.[149] With this extraordinary record and the current Court dynamic, it should be no surprise that future environmental arguments will likely be tailored to fit Kennedy's persuasions.

Individuals and organizations are now clamoring to decipher Kennedy's environmental record and his jurisprudential style. An analysis of Kennedy's environmental history by Michael Blumm at Lewis and Clark Law School uncovers a surprisingly scarce environmental record – until recently. In general, Blumm characterizes Kennedy as "a contextualist, attached to case-by-case fact finding that links context to legal standards."[150] The author also cites a commitment to states rights, and a record of upholding property rights, though his "sentiments do not always point in the same direction."[151] The author's characterizations are consistent with other analyses, which suggest Kennedy's style is somewhat haphazard. Stephen Wermeil, Professor of Law at American University, recently offered that notions of Kennedy as inconsistent were off base and, rather, that Kennedy sometimes "lays out both sides of a case before coming down on one side or the other...."[152] Kennedy himself views his jurisprudential approach as consistent, even if his opinions lend support to conservatives on some issues and to liberals on others.[153] Patrick Schmidt and David Yalof, who researched Kennedy's voting on civil rights and free speech issues in an article for *Political Research Quarterly*, seem to agree, finding that Ken-

147. Warren Richey, *For Supreme Court's New Term: Rise of a New Centrist*, The Christian Science Monitor (Oct. 2, 2006), http://www.csmonitor.com/2006/1002/p02s01-usju.html.

148. *Kelo v. City of New London*, 545 U.S. 469 (2005) (Kennedy joined the 5–4 majority in support of the city's right to use eminent domain power to pursue an economic development opportunity in a residential area that was not blighted).

149. Richard J. Lazarus, *Restoring What's Environmental about Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703, 714 -715 (2000) (*see generally* for an outstanding review of the U.S. Supreme Court Justices' individual records on environmental cases).

150. Michael Blumm, *Justice Kennedy and the Environment: Property, States' Rights, and the Search for Nexus*, ExpressO Preprint Series, Working Paper 1968 (January 30, 2007), http://law.bepress.com/expresso/eps/1968.

151. *Id.* at 7.

152. Nancy Bena, *Justice Kennedy Holds Key to High Court*, The Washington Post (Oct. 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/21/AR2006102100371_pf.html.

153. *Id.*

nedy is fairly consistent on specific policy issues, though he may be more liberal in some areas than others.[154] All of this seems to point to a record colored by strict review of the facts and issues at hand and a philosophical approach that stresses sound legal reasoning within a specific policy context. Understanding those contexts appears to be the key to unlocking the Kennedy puzzle.

Another insight into the Court's institutional dynamics is presented with Chief Justice Roberts's invocation of *Marks v. U.S.*: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[155] Already, lower courts are attempting to interpret the meaning of "narrowest grounds" when applied to the decision and facts of *Rapanos*. While some have argued that the plurality decision represents the "narrowest ground" to the extent that it most severely limits federal jurisdiction, there is little legal precedent to support this view. Instead, most are struggling to apply Roberts's guidance. In anticipation of this confusion, Justice Stevens offered the following judicial guidance in his opinion: "I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction."[156]

While lower courts continue to wrestle with how to interpret *Rapanos* – including how to apply the "narrowest grounds" criteria – it is worthwhile to review how plurality decisions have been treated historically. Generally, the Court's plurality opinion is seen at best as unclear guidance and, at worst, as a failure to perform its function as the nation's highest court. Between these standards, lower courts, agencies, and legal scholars have variously interpreted plurality decisions as pertaining only to specific fact patterns or as providing less substantial guidance than majority holdings. An interesting element to the examination of plurality decisions is their pervasiveness in certain eras of the Court. That is the context in which the *Rapanos* decision becomes most significant. If the *Rapanos* case signals the beginning of an era void of clear legal guidance, confusion amidst the lower courts and regulatory agencies will follow.

V. CONCLUSION

The issues brought forth in *Rapanos* are inherently complex – requiring the Supreme Court to examine a plethora of issues, including the scope of

154. Patrick Schmidt & David Yalof, *The "Swing Voter" Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57(2) Political Research Quarterly (Jun. 2004).

155. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (referencing *Marks v. U.S.*, 430 U.S. 188, 193 (1977)).

156. *Rapanos*, 126 S. Ct. at 2265, note 14 (Breyer, Ginsberg, Souter & Stevens, J.J., dissenting).

the Commerce Clause, statutory construction of the CWA and its complex regulations, jurisdictional limits on federal regulatory agencies, enforcement costs and property rights. A growing body of jurisprudence on these issues, especially the landmark decisions *Riverside Bayview* and *SWANCC*, suggest a framework in which to consider these complexities. Instead of providing clarification within the context of that framework, the plurality in *Rapanos* introduced a new statutory construction that exposed the Court's ideological persuasions and policy preferences, ultimately leading to a split 4-1-4 decision.

In the wake of *Rapanos*, there is uncertainty over whether lower courts will adopt the reasoning set forth by the plurality or through Justice Kennedy's concurrence. This uncertainty only adds another layer of confusion to the larger question of federal jurisdiction under the CWA facing lower courts, the EPA, and the Corps. In this regard, the *Rapanos* decision is a disappointment to all those hoping for clarity on the topic. Despite its shortcomings, however, *Rapanos* provides significant insights into the new Roberts Court, especially the role Justice Kennedy will play in swinging divisive cases one direction or the other.